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July 24, 2006

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 - 12th Street, S.W.
Washington, D.C. 20554

REDACTED – FOR PUBLIC INSPECTION

Re: *WT Docket No. 06-114*
Applications for Assignment of Licenses from Denali PCS, L.L.C. to
Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska
DigiTel, L.L.C. to General Communication, Inc.

Dear Ms. Dortch:

On behalf of MTA Communications, Inc., d/b/a MTA Wireless, attached for filing in the referenced docket are an original and four copies of Supplementary Comments of MTA Communications, Inc. d/b/a MTA Wireless in Support of Petition to Deny Applications. Because these Supplementary Comments reference materials submitted by the applicants in this proceeding in accordance with the Commission's Protective Order dated June 9, 2006, DA 06-1246, these comments are being submitted in confidence subject to the terms of that Protective Order. The undersigned will promptly submit a redacted form of these Supplementary Comments by electronic filing.

Please direct any questions regarding this Acknowledgment of Confidentiality to the undersigned. Thank you.

Sincerely yours,


Stefan M. Lopatkiewicz
Counsel for MTA Wireless

Enclosure

cc: Erin McGrath, Wireless Telecommunications Bureau, FCC
Susan Singer, Wireless Telecommunications Bureau, FCC
Thomas Gutierrez, Counsel for Denali PCS, L.L.C.
and Alaska DigiTel, L.L.C.
Carl W. Northrop, Counsel for General Communication, Inc.
Michael Lazarus, Counsel for General Communication, Inc.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Applications for the Assignment of Licenses from)	
Denali PCS, LLC to Alaska DigiTel, LLC and)	WT Docket No. 06-114
the Transfer of Control of Interests in Alaska)	
DigiTel, LLC to General Communication, Inc.)	
)	

To: The Commission

**SUPPLEMENTARY COMMENTS OF
MTA COMMUNICATIONS, INC. d/b/a MTA WIRELESS
IN SUPPORT OF PETITION TO DENY APPLICATIONS**

MTA Communications, Inc., d/b/a MTA Wireless ("MTA Wireless"), files the following supplementary comments in support of its Petition to Deny ("Petition") the application for assignment of license from Denali PCS, L.L.C ("Denali") to Alaska DigiTel, L.L.C. ("DigiTel"), File No. 0002453582, and application for transfer of control of DigiTel to General Communication, Inc. ("GCI"), File No. 0002453706. These comments supplement the arguments made by MTA Wireless in its Petition, its Reply dated March 13, 2006 to the applicants' Joint Opposition, and its supplementary letter of May 9, 2006 in this proceeding, all of which are hereby incorporated by reference.

BACKGROUND

The applications were filed on January 27, 2006 with the Wireless Bureau for consummation of a single transaction among Denali, DigiTel and GCI. MTA Wireless' Petition, filed on February 15, 2006, brought to the Commission's attention evidence that approval of the applications would result in GCI controlling an inordinately large proportion of Commercial

Mobile Radio Service ("CMRS") spectrum in the Alaska and, in particular, the Anchorage metropolitan portion of the Alaska market in restraint of full and effective competition in the mobile telephony sector. The Petition pointed out that GCI's cooperative relationship with Dobson Cellular Systems, Inc. ("Dobson"), under which GCI has agreed to resell Dobson wireless service in Alaska while leasing to it unused spectrum of its own, must be evaluated by the Commission as part of the "totality of circumstances" affecting the CMRS market in which MTA Wireless competes. MTA Wireless requests that the applications to assign and for transfer of control of Denali's and DigiTel's licenses either be denied or be designated for evidentiary hearing so that the Commission can make a public interest determination on a complete record.

On June 9, 2006, the Commission issued a public notice opening the present docket and announcing that this proceeding will be governed by the Commission's permit-but-disclose *ex parte* procedures.¹ That same day, the Commission directed the applicants to produce into the record copies of all contracts entered into among GCI, DigiTel and Denali regarding GCI's proposed acquisition of a 78 percent ownership interest in DigiTel, copies of any resale/wholesale and spectrum leasing arrangements between GCI and Dobson, and to provide data responsive to a number of other requests. The Commission also issued a Protective Order establishing procedures for the production of requested documents in confidential and redacted form, and for outside counsel of interested parties to gain access to the confidential versions of such documents.²

¹ DA 06-1247.

² DA 06-1246, released June 9, 2006. The Commission simultaneously issued another public notice and Protective Order addressing the potential inclusion in the record of this proceeding of Numbering Resource Utilization and Forecast ("NRUF") reports filed by carriers engaged in the provision of wireless telecommunications services, and disaggregated, carrier-specific local number portability data related to wireless carriers. See DA 06-1248 and 06-1249, released June 9, 2006.

On June 16, 2006, counsel for the applicants filed documents and data responsive to the Commission's request in confidential form, and filed significantly redacted versions of such documents available for public inspection on June 23, 2006. On July 17, 2006, the applicants produced additional documents into the record, in both confidential and redacted form, at the request of counsel for MTA Wireless.

MTA Wireless hereby supplements its Petition with these comments on the documents and data produced into the record by applicants at the Commission's direction.³ Because the discussion which follows will comment in part on materials available to counsel for MTA Wireless in confidential form, these supplementary comments are being filed with the Commission in both confidential and redacted form, thereby adhering to the terms of the Commission's Protective Order.

SUPPLEMENTARY COMMENTS

1. The Reorganization Agreement and Supplementary Documents Confirm GCI Will Exercise *De Facto* As Well As *De Jure* Control Over DigiTel

In response to the Commission's request for filing into the record of "all contracts" entered into among GCI, Denali and DigiTel pursuant to which GCI will acquire 78 percent of the ownership interest in DigiTel, the applicants produced a Reorganization Agreement executed by GCI and the owners of Denali and DigiTel on June 16, 2006.⁴ This document confirms the

³ MTA Wireless received notice of the "Comments/*Ex Parte* Filing and Petition to Intervene of ACS Wireless, Inc." filed in this proceeding late on Friday evening, July 21, 2006. Because MTA Wireless has not had an opportunity properly to digest the contents of that filing, it reserves the right to comment on it separately.

⁴ Curiously, the Reorganization Agreement was not executed by the parties until the date that its production was due pursuant to the Commission's request. This was almost five months after the date on which the parties filed their applications for license assignment and for transfer of control with the Commission. The "transaction" among GCI, DigiTel and Denali described in the applications to the Commission was, in fact, memorialized at the time of the original filing only in an "Amended and Restated Memorandum of Understanding" dated

basic fact conceded by the applicants from the outset -- that GCI will acquire, at the closing, approximately 78 percent of the membership (ownership) interests in DigiTel in the form of newly issued "Common Units."⁵

Under black letter Commission law, this fact alone will, as MTA Wireless has previously noted, result in a transfer of control of DigiTel to GCI. Section 1.948(b)(1) of the Commission's Rules makes clear that "a change from less than 50% ownership to more than 50% ownership of a licensee shall always be considered a transfer of control." Therefore, the documentary confirmation of GCI's change of its ownership interest in the licensee from 0 to 78 percent should end for the Commission the analysis of whether a transfer of control of the licensee will occur which must meet public interest standards.

The applicants have, nevertheless, gone to great lengths to convince the Commission to consider the merits of their applications under the alternative standard of Rule section 1.948(b)(2), which states: "in other situations [than that set forth in 1.948(b)(1)], a controlling interest shall be determined on a case-by-case basis considering the distribution of ownership and the relationships of the owners, including family relationships." That this provision is by its plain terms inapposite to the transaction in question is demonstrative of the applicants'

January 26, 2006 ("MOU"), the day before the applications were filed. At the request of counsel for MTA Wireless, the applicants subsequently produced the MOU into the record. This indicates that the applicants were continuing to negotiate the terms of their final agreement at the same time as they were defending its public interest impact in filings in this proceeding. Equally odd is the fact that, notwithstanding that the Reorganization Agreement was signed several months after the filing of MTA Wireless' Petition, neither Denali nor DigiTel disclosed to GCI in the Agreement that any licenses they hold, relevant to the transaction, are the subject of a petition to deny. *See* sections 3.8.3, 4.8.3.

⁵ Reorganization Agreement among General Communication, Inc., Alaska DigiTel, LLC, the Members of Alaska DigiTel, LLC, AKD Holdings, LLC, and the Members of Denali PCS, LLC, dated as of June 16, 2006, sections 2.3, 2.4.

desperation to avoid the inevitable requirement that their transaction satisfy the Commission's public interest standards, which it cannot do.

The single fact on which the applicants rely in their effort to convince the Commission to undertake a "case by case" analysis of whether a transfer of control will or will not result from their transaction is that, under the terms of an Amended Operating Agreement for DigiTel to be executed following the closing, GCI shall be entitled to appoint only one out of five members of a Board of Managers, which purportedly will exercise "exclusive" management authority over the company.⁶ Yet, the very provision of the Amended Operating Agreement that would vest "exclusive" management authority in the Board of Managers also carves out 14 major managerial decisions which require the approval of the GCI representative on the Board for adoption.⁷ The combination of GCI's large majority ownership interest in the DigiTel, and the clear circumscription of the Board of Managers' authority absent GCI's consent, collectively make clear that the *de facto* control of the company will be exercised by GCI.

In the face of this overwhelming evidence of GCI control embodied in the parties' Reorganization Agreement, the applicants have sought to rely on a single case under which the Wireless Bureau concluded that a majority equity owner did not exercise *de facto* control of a competitor in a wireless spectrum auction simply by exercising veto rights over major corporate actions.⁸ As MTA Wireless has already made clear in its Reply to the applicants' Joint Opposition, the *Alaska Native Wireless* decision is clearly not governing the present proceeding, as it involved a dispute over whether a native-owned company continued to qualify for

⁶ Second Amended and Restated Operating Agreement of Alaska DigiTel, LLC "Amended Operating Agreement"), Exhibit B to Reorganization Agreement, section 7.2.

⁷ *Id.*, section 7.1.

⁸ *Alaska Native Wireless, L.L.C.*, 17 FCC Rcd 4231 (Dep. Chief Wireless Telecomms. Bureau, 2002).

Designated Entity status, which calls for a determination of *de facto* control governed by an entirely separate set of rules.⁹ Where the Commission is considering a transfer of control, if a *de jure* transfer under section 1.948(b)(1) of the Rules has occurred, the determination of whether *de facto* control of the licensee by the majority equity owner is never reached under section 1.948(b)(2).

Examination of the evolution of the parties' transaction, which was finally memorialized in the Reorganization Agreement executed on the deadline of the Commission's request for document production, provides some insight into why the applicants' might erroneously believe they can rely on Commission decisions concluding that *minority* investors in licensees do not necessarily gain *de facto* control through the exercise of veto rights over certain managerial decisions. When the parties executed their Amended MOU in January 2006, GCI's only assured ownership interest in DigiTel post-closing was 1,600 membership interests (out of a total capitalization of 3,600 units) which it would obtain by acquiring Denali and contributing its value to DigiTel, together with _____ in cash. The DigiTel owners retained the prerogative to determine whether they would sell any of their Common Units in the company to GCI at the closing and, if so, how many.¹⁰

As a result, it was by no means established at the signing of the Amended MOU that GCI would gain a majority ownership interest in DigiTel.¹¹ Consequently, the Amended MOU guaranteed GCI certain "customary minority protection rights" in company management.¹² In an amendment of the Amended MOU signed on March 15, 2006, however, the applicants agreed

⁹ See sections 1.948(b)(3) and 1.2110 of the Rules.

¹⁰ Amended MOU, sections 4, 5.

¹¹ Curiously, notwithstanding this fact, the applicants represented in their original applications to the Commission that GCI would end up with a 78% ownership interest in DigiTel.

¹² Amended MOU, section 7(d).

that GCI would acquire 1,350 of the 2,000 Common Units of DigiTel held by DigiTel's incumbent owners.¹³

As a majority *de jure* owner of the licensee, the super-majority voting right standards considered by the Commission in determining *de facto* control of a licensee by a minority owner were no longer of relevance. Nevertheless, the applicants improperly continue to try to rely on them.

In any case, two aspects of the Reorganization Agreement produced by the applicants make clear that GCI will exercise even *de facto* control over DigiTel post-closing in a manner that AT&T Wireless, as a non-voting member of Alaska Native Wireless, could not have:

First, in addition to the veto rights over major managerial decisions identified in section 7.1 of the Operating Agreement, GCI will exercise veto power over the adoption of the DigiTel Annual Budget, since section 7.5 of the Operating Agreement requires that a GCI representative serve on the Board of Manager's Budget Committee, and section 7.5(b) states that approval of the budget requires *unanimous* consent of either the Board of Managers or its Budget Committee. By exercising control over the company's budget, GCI will effectively be able to control the implementation of its business plan and the identification and funding of all operational aspects of the licensee's business. Moreover, section 7.1(x) reaches a level of granularity on this power of GCI by stating that GCI's approval is required over any "deviation from the Annual Budget then in effect of 10% or greater from an approved line item or budget category or [for the company] to engage in any transaction which has not been budgeted for in the Annual Budget in effect."

¹³ First Amendment to Amended and Restated Memorandum of Understanding, section 2.

The facts thus presented again find parallels in the *Baker Creek Communications* decision¹⁴ previously relied on by MTA Wireless in its Reply to the applicants' Joint Opposition. In that ruling, the Commission found that a *minority limited partner's* ability to control the business plan and budget of an applicant for a wireless license gave that *minority* equity owner *de facto* control over the applicant.¹⁵ In the present case, where GCI is the *majority* equity owner of the licensee, the *de facto* control which this power gives it is all the more evident.

Second,

¹⁶ The applicants assert that GCI's investment in DigiTel will serve the public interest by enabling it to recapitalize and, thereby, strengthen DigiTel as an operating entity.¹⁷ It is evident that GCI, as the largest telecommunications company in Alaska, has the financial wherewithal to

¹⁴ *Application of Baker Creek Communications, L.P.*, 13 FCC Rcd 18709 (Chief, Public Safety and Private Wireless Division)(1998).

¹⁵ *Id.*, at 18719-20.

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¹⁷ Exhibit 1 to FCC Form 603, at 4.

As a result, no matter how many representatives the minority owners are officially given on the Board of Managers, they will not be able to exercise real authority independent from GCI.

When all these factors – GCI’s majority ownership position, its ability to control the budget process, its veto rights over other major decisions of the Board of Managers, and

– are considered together,

there is no escaping the conclusion that GCI will exercise *de facto* operational control over DigiTel, as well as *de jure* control. The Reorganization Agreement also makes clear that GCI will control all tax planning aspects of the licensee, and will consolidate the earnings of the licensee with its own for tax purposes.¹⁸ As the majority owner of the company, GCI will even have limited rights to amend the terms of the Operating Agreement itself.¹⁹ It is difficult to understand how the applicants can attempt to argue to this Commission under all these circumstances that no real transfer of control would take place if consent is given to the applicants’ transaction, and that GCI would not thereafter exercise real, operational control over DigiTel and its licenses.

**B. GCI’s Agreements with Dobson Reveal an Extraordinarily
Close Cooperative Relationship Between Competitors**

1. Significant Contract Terms

In response to the Commission’s directive to produce into the record “any resale/wholesale and spectrum leasing agreement(s) between GCI and Dobson,” the applicants filed copies of an Agreement between GCI and Dobson effective as of July 26, 2004, which

, as well as a Long-Term *De Facto* Transfer Spectrum Lease

¹⁸ Amended Operating Agreement, sections 10.3-10.5.

¹⁹ *Id.*, section 16.1.

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Agreement dated April 15, 2005 between the same parties ("Spectrum Transfer Lease"). In response to request by counsel for MTA Wireless, the applicants subsequently also produced a copy of a Short-Term Spectrum Manager Lease Agreement between GCI and Dobson ("Spectrum Manager Lease") which was executed by the parties simultaneously with the

Agreement and was superseded by the Spectrum Transfer Lease. Considered as a whole, the three agreements reflect an extraordinarily profound level of cooperation between GCI and the largest wireless provider in the Alaska market.

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Further evidence of this GCI

business plan is found in GCI's response to Commission questions 9(a) and (b) in its request for

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data production, where GCI confirmed that it secures all of its phone numbers used for its wireless customers from Dobson.³²

³² Letter from Carl Northrop, counsel to GCI, to Marlene Dortch, dated June 16, 2006, page 2.

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Since the Spectrum Transfer Lease was entered into to replace the Spectrum Manager Lease

The peculiar nature of this arrangement makes more sense when viewed as a means of

What is of significance to the instant proceeding, however,

This understanding differs from the representation made by the applicants to the Commission in their Joint Opposition that

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2. *Analysis*

Analysis of the terms of the Agreement and Spectrum Leases between GCI and Dobson reveal that the two parties are not acting as competitors in the Alaska CMRS market, but more as partners. At a minimum, these agreements demonstrate a coordinated course of conduct between two of the largest telecommunications providers in the state connoting significant competitive ramifications.

The record now contains clear evidence that

The public disclosure of this relationship

vindicates the analysis advanced in MTA Wireless' Petition to Deny that, in the key Anchorage market, this equates to an aggregation of control over 115 MHz of cellular and PCS spectrum. Nor is there any legitimate reason to "credit" GCI, when calculating the concentration of spectrum which the transaction will make possible,

The contractual undertakings of GCI and Dobson to one another also confirm MTA Wireless' analysis that GCI has effectively warehoused its state-wide PCS spectrum over most of the life of its license since 1995, and

CONCLUSIONS

Because GCI's acquisition of a 78-percent ownership interest in DigiTel will equate to *de jure* control of that licensee, any attempt to argue that the applicants' proposed transaction will not result in a transfer of control is legally groundless. Moreover, the record now confirms that GCI will also exercise *de facto* control over DigiTel. Approval of the proposed assignment of Denali's license and transfer of control of DigiTel must be assessed, therefore, with the understanding that it will result in GCI controlling, to begin with, all 60 MHz of state-wide-licensed PCS spectrum in the Alaska market currently shared with DigiTel and Denali.

Moreover, the competitive impact of the transaction underlying the applications must also take account of GCI's collaborative relationship with Dobson, which easily meets the Commission's test for explicit or tacit cooperative constraints on market behavior that can lead to

horizontal contraction of the mobile telephony industry.⁴⁴ As stated in the Horizontal Merger Guidelines issued by the Department of Justice and the Federal Trade Commission,⁴⁵ which the Commission employs as a starting point for its analysis of the potential anticompetitive impact of mergers on wireless markets:

“Terms of coordination need not perfectly achieve a monopoly outcome in order to harm consumers....Terms of coordination may omit some market participants or dimensions of competition and still result in competitive harm.”⁴⁶

Employing this approach, the additional 55 MHz of cellular and PCS spectrum Dobson controls in the key Anchorage market, as well as its smaller PCS and cellular licenses in the Fairbanks and Juneau markets, must be taken into account as a measure of the potential for anticompetitive harm to which the applicants’ proposed transaction would give rise. When aggregated, the spectrum collectively controlled and/or operated by Dobson and GCI in the state’s three leading metropolitan markets, accounting for the overwhelming majority of the state’s population, exceeds 70 MHz (in Anchorage, by a substantial amount),⁴⁷ thereby satisfying the threshold level of concern that even GCI concedes the Commission has established in its recent examinations of the competitive impact of mergers in national markets.

Both across the state of Alaska, and in the Anchorage metropolitan area where the subscriber base of most immediate concern to MTA Wireless resides, Dobson and DigiTel

⁴⁴ *Application of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, 19 FCC Rcd 21522 (2004) (“*AT&T/Cingular Order*”), at 21580.

⁴⁵ Issued April 2, 1992, revised April 8, 1997 (hereinafter, “DOJ/FTC Guidelines”). See *AT&T/Cingular Order*, at 21552, n. 223.

⁴⁶ *AT&T/Cingular Order*, at 21580; DOJ/FTC Guidelines, § 2.11.

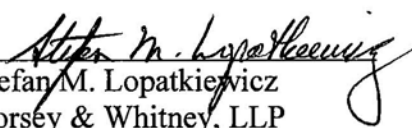
⁴⁷ MTA Wireless continues to disagree with the applicants’ position regarding the applicability of any such arbitrary threshold test for the reasons stated in its Reply to applicants’ Joint Opposition, at 9.

represent two of the three largest wireless operators,⁴⁸ and GCI is the largest provider of integrated telecommunications services. The constraint that a collaboration of these three entities will have on MTA Wireless' potential ability to access additional cellular or PCS spectrum or to secure competitively neutral roaming terms is tangible.⁴⁹ The existence of numerous smaller wireless providers serving isolated rural communities across the state is of no relevance in this competitive assessment, since these communities do not represent population centers of near-term interest to MTA Wireless.

MTA Wireless hereby renews its petition that the Commission deny the applications as contrary to the public interest. Alternatively, MTA Wireless requests that the Commission designate the applications for an evidentiary hearing in which all interested parties will have an opportunity for full identification and evaluation of the "totality of circumstances" which those applications present.

Respectfully submitted

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July 24, 2006

⁴⁸ The third is ACS Wireless.

⁴⁹ See Declaration of Carolyn Hanson, ¶¶ 9-11, attached to Petition to Deny; Declaration of Richard Kenshalo, ¶¶ 5-7, attached to MTA Wireless Reply to Joint Opposition.